Supreme Court, U.S.
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NO. 95-1810

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SHEILA CONKLE,

Petitioner,

vs.

COURT OF APPEALS FOR THE NINTH CIRCUIT,

Respondent,

SULINNA JEONG, dba LAIRD'S FOOD MARKET, et al.

Real Parties in Interest

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Moris Davidovitz, Esq.
DAVIDOVITZ & YARON
111 Pine St., 12th Fl.
San Francisco, CA 94111
(415) 658-0426
Attorneys for Sulinna Jeong, dba Laird's Food Market; Baldwin Jeong; and Jadelin Enterprises, a Corporation, dba Laird's Food Market, Real Parties in Interest

Opp

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I.
INTRODUCTION

Petitions for Writ of Certiorari are granted only for compelling reasons. (U.S.Sup.Ct.Rule 10, 28 U.S.C.) Compelling reasons include splits among Circuit Courts of Appeals, decisions relating to important questions of federal law not yet settled by this Court, or decisions which conflict with relevant decisions of this Court. (*Id.*)

No such compelling reason for grant of the Petition of Petitioner SHEILA CONKLE ("CONKLE") exists. Instead, the Petition merely asserts erroneous factual findings and requests review of alleged misapplication of law. These grounds for review by this Court, however, are disfavored. (*Id.*)

Because CONKLE's Petition is only an attempt to have this Court review various findings and discretionary rulings of RESPONDENT court, and because no compelling reason is stated or exists for granting the Petition, Real Parties in Interest SULINNA JEONG, dba LAIRD'S FOOD MARKET, BALDWIN JEONG, and JADELIN ENTERPRISES, a Corporation, dba LAIRD'S FOOD MARKET (hereafter "EMPLOYER" Real Parties in Interest) respectfully request that this Court DENY the Petition for Writ of Certiorari. Further, should this Court grant the Petition for Writ of Certiorari, EMPLOYER Real Parties in Interest respectfully request a full opportunity to brief and argue this matter on the merits as provided by U.S.Sup.Ct.Rule 16, 28 U.S.C.

II.
ARGUMENT AGAINST ALLOWANCE OF THE PETITION FOR WRIT

None of Petitioner CONKLE's Questions Presented for Review, when examined with the record and opinion of RESPONDENT, enunciate any compelling matters providing good cause for exercise of this Court's discretionary review.

A. CONKLE's First Question for Review complains that RESPONDENT misapplied properly stated controlling law.

CONKLE's First Question for Review requests review of the findings against CONKLE by RESPONDENT Ninth Circuit. Because, as the Petition reveals, RESPONDENT applied this Court's test of "arbitrariness" in review of the UNION Real Parties' conduct towards her, the Petition fails to demonstrate that there is any compelling reason for granting review on this question.

RESPONDENT Ninth Circuit Court of Appeals expressly applied the very legal standard of arbitrariness set forth by CONKLE as the proper standard, the *Airline Pilots Assn. Int'l. v. O'Neill*, 499 U.S. 65, 67, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991) standard. (See, *Conkle v. Jeong*, 73 F.3d 909, 915 (9th Cir., 1995); Petition for Writ, at 14.) Applying this standard, RESPONDENT noted that a union's actions would be arbitrary only:

> "If, in light of the factual and legal landscape at the time of the union's actions, the union's

> behavior is so far outside a 'wide range of reasonableness,' as to be irrational."

(*Conkle*, 73 F.3d at 915 (citing *Airline Pilots Assn.*, 499 U.S. at 67).)

Applying that standard, RESPONDENT Ninth Circuit found that the UNION representative's actions were reasonable, and that there was no evidence presented of any bad faith on the part of the UNION. (*Conkle*, 73 F.3d at 915-916.)

Attempting to manufacture a split among Circuit Courts of Appeals, CONKLE argues that RESPONDENT failed to apply the standard in *Aguinaga v. United Food & Com. Workers*, 993 F.2d 1463, 1471 (10th Cir. 1993), *cert. den.* 114 S.Ct. 880 (1993), finding bad faith for abandonment of all member claims. However RESPONDENT specifically noted that UNION did not abandon all claims of its members with respect to LAIRD'S MARKET as asserted by Petitioner: on March 10, 1993, the new management of the market agreed to be bound by the Master Food Agreement previously operative at LAIRD'S through to its original intended conclusion. (*Conkle*, 73 F.3d at 913.)

RESPONDENT thus applied the very legal standard, that of *Airline Pilots* as construed by *Aguinaga*, CONKLE would have this Court apply on review. This question has not a sufficiently compelling reason to grant review on Writ of Certorari. (U.S.Sup.Ct.Rule 10, 28 U.S.C.)

Finally regarding her First Question for Review, CONKLE speaks of RESPONDENT "overlooking," (Petition at 14), evidence she subsequently notes RESPONDENT "passed" upon. (*Id.*) Of course, if RESPONDENT "passed upon" such evidence as alleged it obviously did not ignore such evidence.

Accordingly, CONKLE's First Question for Review requests this Court second-guess determinations made by RESPONDENT despite the clear record that RESPONDENT applied the very rules cited by CONKLE as controlling in her Petition. Review of such matters is not a valid ground for grant of a Petition for Writ of Certiorari. (U.S.Sup.Ct.Rule 10, 28 U.S.C.) Accordingly, review of the First Question Presented should be DENIED.

B. CONKLE's Second Question for Review also requests review of findings of RESPONDENT without stating any compelling reason for exercise of this Court's discretionary powers.

CONKLE's Second Question for Review asserts as error improper "weighing" of evidence in upholding the District Court's ruling on summary judgment. (Petition at 1, 17.) She asserts RESPONDENT "ignor[ed] completely" so-called evidence presented by CONKLE. (*Id.* at 1.)

CONKLE nowhere asserts that RESPONDENT applied an incorrect rule of law in upholding the District Court's grant of Real Parties' Motions for Summary Judgment. She notes that such decisions are reviewed de novo. (Petition at 17.) This was the standard of review used

by RESPONDENT. (*See, Conkle*, 73 F.3d at 915, 917.) No assertion of an improperly stated rule of law therefore appears in the Petition.

Although CONKLE asserts that certain evidence was "ignored," or that RESPONDENT performed an improper balancing of evidence, (Petition at 17 - 19), the Petition makes no such showing.

RESPONDENT did not "overlook" evidence cited by CONKLE, (Petition at 19), of animus against her allegedly held by UNION personnel. RESPONDENT noted this evidence, but found there was no evidence that this dislike prompted mention of the medical release fancifully described by CONKLE as the smoking gun. (*See, Conkle*, 73 F.3d at 916.) Furthermore, RESPONDENT discredited the inference CONKLE would have this Court make, that the UNION could have known the result of its mentioning the medical release, because, as the uncontroverted evidence demonstrated to RESPONDENT, the results of her medical examination were a surprise even to CONKLE. (*Conkle*, 73 F.3d at 916.)

CONKLE therefore misstates the reasoning and Opinion of RESPONDENT in her attempt to manufacture an argument that RESPONDENT decided this action on an improper basis. CONKLE's Second Question for Review does not argue any actual failure of RESPONDENT to apply properly stated rules of law.

Because CONKLE's Second Question for Review fails to request this Court resolve splits among the Circuit Courts

of Appeals and fails request review of questions not already settled by this Court, it is apparent her Second Question is little more than a request that this Court second-guess determinations made by RESPONDENT in application of the very rules cited by CONKLE in her Petition as being the controlling law.

Review for this reason is improper. (*See,* U.S.Sup.Ct.Rule 10, 28 U.S.C.) Review of the Second Question Presented should therefore be DENIED.

C. CONKLE's Third Question for Review states no question warranting review by this Court as it requests review of RESPONDENT'S affirmation of discretionary rulings relating to discovery and remand of State Court actions. No new questions of law, splits of opinion among Circuits or other issue properly reviewed by this Court is presented.

CONKLE'S Third Question for Review (which actually contains three questions) requests review of discretionary discovery and remand rulings affirmed by RESPONDENT.

1. CONKLE fails to demonstrate any error by RESPONDENT in upholding the District Court's discretion to close discovery.

Prior to ruling on the Summary Judgment Motion, the District Court denied CONKLE's request to conduct further

discovery. CONKLE herself notes that this discovery determination was a matter for the District Court's discretion. (Petition at 24.)

RESPONDENT analyzed this order under the abuse of discretion standard, (See, *Conkle v. Jeong*, 73 F.3d at 914 (citing *International Alliance of Theatrical and Stage Employees v. Compact Video Servs., Inc.*, 50 F.3d 1464, 1466 (9th Cir. 1995), cert. denied, 116 S.Ct. 514 (1995).) This is nowhere challenged as improper by CONKLE in her Petition.

Moreover, in its review RESPONDENT specifically noted that CONKLE's attorney had drafted the very stipulation which closed discovery, including exceptions to permit CONKLE to conduct further unfinished discovery. (*Id.*)

CONKLE can hardly claim as error RESPONDENT'S affirmation of the District Court's discretionary ruling closing discovery where the discovery close was drafted by CONKLE herself. Moreover, she cites no authority demonstrating that the standard of review used below was improper or otherwise resulted in any determinations warranting review here.

2. CONKLE raises no novel question regarding her right to trial by jury and fails to demonstrate error below to warrant her Petition.

CONKLE raises no new issue regarding the right to

trial by jury of her causes of action not previously addressed by this Court in its extensive analyses of the right to summary judgment motions in federal Courts. CONKLE fails to note a single case cited by RESPONDENT Ninth Circuit or the District Court which improperly states the standards applicable in ruling on summary judgment motions set forth by this Court.

3. CONKLE'S assertion that RESPONDENT "should" have remanded her State Court claims to the California courts raises no compelling matters sufficient to have this Court grant her Petition.

The District Court had supplemental jurisdiction over CONKLE's State law claims. (28 U.S.C. §1367.) It also had discretion over whether to remand CONKLE's State law claims upon disposition of her federal claims (*Id.*). Therefore, although the District Court could have remanded CONKLE's State law claims after disposition of her federal claims, (28 U.S.C. §1367(c)), whether to do so was a matter of discretion for that Court. (*Gary v. Long*, 59 F.3d 1391, 1400 (Fed. Cir. 1995, cert. denied 116 S.Ct. 569.) Given the time this matter had been litigated in federal court and the substantiality of her federal claims, the District Court's discretion to decide the remaining State law claims was proper. (*Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992), cert. den. 507 U.S. 1004, 113

S.Ct. 1644.)[1/]

CONKLE nowhere challenges the constitutional or statutory authority of the District Court's exercise of jurisdiction over her pendent State law claims. Rather, she seeks to have this Court second-guess concededly discretionary rulings upheld by RESPONDENT.

For these reasons, CONKLE's Third Question for Review states no proper basis for exercise of this Court's discretionary power of review by Writ of Certiorari. Her Petition should be DENIED.

III.
CONCLUSION

CONKLE's Petition fails to demonstrate any disputes among Circuit Courts of Appeals and fails to demonstrate any improper statements of law by RESPONDENT resulting in an improper decision below. The Petition's arguments are no more than requests for further review of discretionary matters having none of the characteristics of "compelling matters" warranting review by this Court. CONKLE's Petition for Writ of Certiorari merely petitions this Court to perform yet another analysis of these already well-litigated facts. This is an insufficient basis for granting review here.

[1/] CONKLE's citation to *Merry v. Coast Community College*, 97 Cal.App.3d 214, 158 Cal.Rptr. 603, (1979), is unpersuasive. An intermediate State appellate court does not bind the federal District Court (or this Court) in interpretation of the propriety of federal jurisdiction under federal statutes or the United States Constitution.

(*See,* U.S.Sup.Ct.Rule 10.)

CONKLE's claim that her State Court actions should have been remanded is particularly odd given that CONKLE has filed and is currently litigating related State Law claims in the Courts of the State of California.[2/]

Accordingly, Real Parties in Interest SULINNA JEONG, dba LAIRD'S FOOD MARKET, BALDWIN JEONG, and JADELIN ENTERPRISES, a Corporation, dba LAIRD'S FOOD MARKET respectfully request that this Court DENY the Petition for Writ of Certiorari of Petitioner SHEILA CONKLE.

DATED: June 4, 1996 DAVIDOVITZ & YARON

BY _____
MORIS DAVIDOVITZ
Attorney ~~for~~ Real Parties in Interest, Sulinna Jeong, dba Laird's Food Market; Baldwin Jeong; and Jadelin Enterprises, a Corporation, dba Laird's Food Market

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[2/] *Conkle v. Jeong, et al.*, Superior Court, State of California, No. C95-00496, demurrer granted, appeal pending, *Conkle v. Jeong, et al.*, Court of Appeal of the State of California, First Appellate District, Division 3, Civil No. A072483.

CERTIFICATE REQUIRED PURSUANT TO U.S. SUP.CT. RULE 29(6), 28 U.S.C.

The undersigned, counsel of record for Real Party in Interest Jadelin Enterprises, a corporation, certifies that there are no parent companies or non-wholly owned subsidiaries to be listed pursuant to U.S. Sup.Ct. Rule 29(6), 28 U.S.C.

Dated: June 4, 1996 DAVIDOVITZ & YARON

By: _____
MORIS DAVIDOVITZ
Attorney for Real Parties in Interest, Sulinna Jeong, dba Laird's Food Market; Baldwin Jeong; and Jadelin Enterprises, a Corporation, dba Laird's Food Market